IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted] 198

JOSEPH SEEMAN, SIGEL W. SEEMAN, SYLVAN L. STIX, CARL SEEMAN and FREDERICK SEEMAN, co-partners, doing business under the firm name and style of SEEMAN BROTHERS,

Petitioner,

against

PHILADELPHIA WAREHOUSE CO.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LEVENTRITT, RIEGELMAN, CARNS & SCHWARZ,
Attorneys for Respondent,
44 Pine Street,
New York, N. Y.

DAVID LEVENTRITT,
OWEN J. ROBERTS,
CHARLES A. RIEGELMAN,
ARTHUR WATSON,
of Counsel.

PRESS OF FREMONT PAYNE, 80 Washington Street, New York City.

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The respondent's claim is that the petitioners converted certain salmon pledged by A. J. Coccaro & Co., of New York City, with the respondent. The conversion was accomplished by the purchase and acquisition of the salmon by the petitioners from A. J. Coccaro & Co. The sale of the salmon by A. J. Coccaro & Co. was fraudulent, as was that of other merchandise similarly pledged with the

respondent, as will be shown by this brief. A. J. Coccaro & Co. and the two members of that firm later went into bankruptcy. The respondent's total loss in all its dealings with A. J. Coccaro & Co., covering six different transactions, exceed $55,000 (fols. 397, 1135, 40).

The petitioners' defense was the claim of usury in the transactions between the respondent and A. J. Coccaro & Co.

The respondent is a corporation of the State of Pennsylvania, having its only office in the City of Philadelphia, Pennsylvania, where it has been carrying on its business since 1871 (fol. 279). Early in its history, respondent adopted a method of lending its high credit, built on its resources and standing under written agreements. Its contracts and methods, as was pointed out in the opinion below, have been sanctioned as far back as 1882 by the highest court in Pennsylvania (Righter & Cowgill Co. v. Philadelphia Warehouse Co., 99 Penn. St., 289).

Respondent's Regular Course of Business.

As a correct understanding of the respondent's plan of doing business is necessary for the determination of this application, we ask the indulgence of the court for the rather lengthy statement which follows:

In ordinary parlance the respondent's business, for a number of years, was as follows: It lent its credit by delivering its own promissory note to a merchant, who pledged with the respondent merchandise to insure that at the maturity of the note the merchant would make provision for its payment. Thus the pledgor received a note which

could readily be turned into cash by its sale, through note brokers, to various banks throughout the country, who recognized, through 50 years of experience, the financial standing and worth of the respondent (fol. 281). In this fashion the respondent advanced its credit upon merchandise deposited with it as collateral to an agreed percentage of the market value of such merchandise, as determined by the respondent's inspection and by independent appraisal (fol. 284). The respondent's uniform charge and the actual amount it invariably received for the issuance of its promissory notes against pledge of merchandise in public warehouse, was at the rate of 3 per cent. per annum upon the face amount of its notes so issued (fol. 285). Beyond this charge the respondent neither received nor exacted additional remuneration, commission or benefit, directly or indirectly (fols. 285, 305, 348, 395).

The respondent would deliver its note to the person applying for the advance of credit to be disposed of as the applicant chose; or the respondent would, for the applicant's accommodation and on his written instruction, turn over the note to a note broker for sale by him as agent for the applicant. In that case, it would deliver to the applicant the identical check received from the broker (fols. 285, 341, 545, 563). Respondent preferred to have these notes handled through brokers accustomed to selling its notes because of their knowledge of the market for respondent's paper, through being in touch with banks and other buyers of commercial paper from Maine to California, who have been buying this paper for the past half century. But it did not insist that the notes be sold by the applicant only through those brokers recommended by the respondent (fol. 286). (See, for

example, two transactions between respondent and Coccaro & Co., where notes were sold to a bank, not one of its own banks of deposit, without the intervention of note brokers, and where respondent returned to Coccaro & Co. the customary broker's commission paid in advance by the applicant [Plaintiff's Exhibits 35, fols. 1124-25; 37, fols. 1129-30; 41-D.-C., fols. 1192; 41-F.-C., fols. 1210-11.])

The statement contained in the brief of petitioners (bottom of pp. 3, 14) that the respondent required Coccaro to designate Lewis & Co. (the note brokers who sold the notes in question here) is wholly unsubstantiated by the evidence, and is untrue. Likewise, the statement in petitioners' brief (p. 7) that the respondent at times gave its notes to its own bank, is untrue and unsubstantiated in the record. The fact is otherwise.

Considering now the actual practice adopted in carrying out the plan outlined above, we come to examine the actual documents used in connection with these advances of credit, which so clearly distinguish the transaction from a loan of money. When an advance of credit was made the applicant uniformly signed a printed pledge agreement (Exhibit 21, fols. 1057-68).

At the same time, the applicant paid to the respondent its commission, in advance, at the rate of 3 per cent. per annum upon the face of the notes which it issued and the sum necessary to pay for the Internal Revenue stamps thereon. These notes were always issued by the respondent at its office in Philadelphia where the applicant, by the terms of his printed agreement, was required to make all of his payments (fols. 404, 1059).

If the applicant desired the respondent's promissory notes to be delivered to him direct, that was

done (fol. 286). If he wanted them sold by the note brokers, recommended by the respondent, he signed and delivered to the respondent an order to that effect.

It is to be observed that respondent's obligation to the applicant terminated upon the issuance and delivery of its notes—in Philadelphia. In each instance where the respondent, acting for the applicant turned over these notes for sale to a note broker, the money resulting from the sale was remitted by the broker in Philadelphia to the respondent, in Philadelphia, as the applicant's representative who sent to the applicant the identical check so received.

When the date of maturity of the note, originally issued by the respondent, arrived, the applicant was, under the terms of his contract, obliged to pay to the respondent a sum equivalent to the face value of the note itself (fol. 1059). If, however, on the due date the applicant was unable or unwilling to make this payment, his inability or unwillingness did not relieve the respondent from the necessity of paying its own promissory note previously sold in the open market. If the applicant performed his contract he paid a sum equivalent to the face amount of the note to the respondent, the respondent was then in funds to meet its own maturing obligation, and the transaction was closed. If, however, the applicant did not do this, the respondent, under the contract, could have recourse to the security. To avoid this latter contingency, a machinery was provided by which, for the convenience of the applicant, the respondent on the written application of the applicant (see Exhibit 30, fol. 1102), would issue a new note in like sum, which, in turn, would be sold in the open market to supply itself partially with funds to meet its maturing obligation. We have said to put itself in

funds partially, because, just as in the first instance the original note was sold in the open market at a discount from its face value, so must the second note be sold at whatever rate was then current on the discount market, which might or might not vary from the original discount. When this renewal note was sold, the net proceeds thereof, that is to say, the proceeds less the discount and broker's fees, were paid over to the respondent, and when applied in full to the redemption of its maturing obligation, would leave a balance still to be met. This small balance was supplied by the applicant who, at the time that he requested the further renewal, or, as the parties have termed it, an extension of the advance of credit, paid by his check to the respondent a sum equivalent to the discount, brokerage fees and the Internal Revenue stamps (fol. 347). With these moneys paid to it by the applicant, together with the net proceeds of the sale of the new note, the respondent was placed in possession of funds with which to meet its original obligation then maturing. The original transaction was thus closed, and a new transaction was thus substituted for it. He also paid in order to induce the respondent to make this further advance, a charge at the rate of 3% per annum on the respondent's new notes on the new transaction. It is to be observed that by this operation the respondent performd the same service in this so-called extension as it performed in the original transaction (fols. 344-605).

The respondent, each year, issued its notes in these transactions in an amount between $2,000,000 and $5,000,000 (fol. 927), a substantial part of which was sold by S. B. Lewis & Co., note brokers (fol. 626). S. B. Lewis & Co. is a Pennsylvania corporation, specializing in the sale of commercial

paper and has its office in Philadelphia. It has been in this business for many years (fol. 568). It is a corporation separate and distinct from the respondent and has no relations with the respondent and none of its officers or members are officers or members of the respondent (fol. 572). Neither one of the two concerns was interested directly or indirectly in the affairs of the other, or in the profits of the other, or otherwise. S. B. Lewis & Co. keeps the respondent informed of the current market rate at which the respondent's paper can be sold so that its officers and employees can inform applicants (fol. 649).

The facts with reference to the advance of credit of $5,900 on November 18th, 1919, the one under which the salmon converted by the petitioners was pledged to the respondent.

In the instant case the procedure with Coccaro & Co. followed in every particular respondent's regular methods, and the printed forms used were those regularly employed (fol. 527).

This action is brought to recover the sum of $8,000 for the conversion of 999 cases of Blue Boy Canned Salmon, the title to which was in the respondent under a negotiable railroad bill of lading, endorsed to the respondent by A. J. Coccaro & Co., a partnership of New York City, on November 18, 1919.

These cases were pledged on that day by Coccaro & Co. to the respondent as security for an advance of credit in the sum of $5,900 to be made by the respondent and by the terms of the pledge agreement to be held as security for other advances of credit prior and subsequent.

The respondent advanced its credit by issuing its promissory note in the sum of $5,900, dated November 18, 1919, payable January 20, 1920. This note was sold in Philadelphia by S. B. Lewis & Co., as note brokers, on November 19, 1919, under the written order from A. J. Coccaro & Co. (Plaintiff's Exhibit 23, fol. 1069). The net proceeds of the sale thereof, to wit, $5,384.20, represented by a cashier's check to the order of the plaintiff, received by the respondent from S. B. Lewis & Co. and immediately thereafter endorsed and delivered, by the respondent to the order of the First National Bank of Philadelphia, was by that bank at once remitted to Coccaro & Company in New York City at their request, by telegraphic transfer to their account in the Irving National Bank (Plaintiff's Exhibit 22, fols. 1069-70; Plaintiff's Exhibit 24, fols. 1087-89; Plaintiff's Exhibit 25, fol. 1090; Plaintiff's Exhibit 26, fols. 1093-4; Plaintiff's Exhibit 27, fol. 1095, and Plaintiff's Exhibit 28, fol. 1096).

The facts and the circumstances under which this note was issued by the respondent are as follows: The respondent receives many applications through brokers seeking accommodation for their customers (529). In that way the respondent met A. U. Surprenant & Company, then of No. 10 Broad Street, New York City, who brought to the respondent various applicants, among them Coccaro & Company.

Surprenant & Company secured financial accommodations for Coccaro & Co. from various persons besides the respondent (fols. 772-90; fols. 812-22; Plaintiff's Exhibits 50, 51 and 52, fols. 1309-11).

Nearly two years prior thereto, to wit, in January, 1918, A. U. Surprenant first brought Coccaro & Co. to the respondent for an advance of credit from the plaintiff (fol. 283). Surprenant

introduced Anthony J. Coccaro to William P. Cosgrove, the secretary of the respondent, in the office of A. U. Surprenant & Company in New York City (fol. 283). At that interview, Cosgrove explained in detail the nature and methods of respondent's business (to Coccaro) and that the respondent would only advance its credit through the issuance of its promissory notes, which Coccaro & Co. might sell direct, or which might be sold for Coccaro & Company by note brokers (fols. 284-290). That interview resulted in the respondent making its first advance of credit to Coccaro & Co.

On October 22, 1919, Coccaro & Co. had entered into an agreement with A. U. Surprenant & Co. under which the latter, for a consideration, was to obtain financial accommodation for Coccaro & Co. to finance the purchase of merchandise (fols. 781-82; Exhibit F, 1319-34). The respondent knew nothing whatever about the arrangement between Coccaro & Co. and A. U. Surprenant & Co. (fols. 968-9; 861).

In connection with the advance of credit by the respondent's note of $5,900, hereinbefore described, A. J. Coccaro & Co., on November 18, 1919, signed the usual pledge agreement pledging to the respondent 1,000 cases of Blue Boy Canned Salmon to secure the respondent for such advance, and other advances of credit already made or which might thereafter be made by the respondent. In token thereof Coccaro & Co. endorsed and delivered to the respondent the negotiable bill of lading for 1,000 cases of Blue Boy Canned Salmon (Plaintiff's Exhibit 21, fols. 1058-68; Plaintiff's Exhibit 23, fols. 1070-84).

The respondent at the request of Coccaro & Co. instructed the Yorke Warehouse & Storage Co., Inc., of New York City, to secure the cases of

salmon from the railroad, and store the same in one of its warehouses for the respondent. Thereafter, the respondent received from the warehouse company a non-negotiable warehouse receipt for the salmon (fol. 999; Plaintiff's Exhibits 43-45, fols. 1216-20; Plaintiff's Exhibit 47, fol. 1303; Plaintiff's Exhibit 2, fols. 1039-41; Plaintiff's Exhibit 19, fols. 1054a-56a).

Thereafter, and between February 25, 1920, and March 26, 1920, the petitioners and their assignees removed the said cases of salmon from the warehouses under an order issued to them by Coccaro & Co. on February 18, 1920 (Plaintiff's Exhibit 3, fols. 1042-1044; Plaintiff's Exhibit 1, fols. 1036-38; Plaintiff's Exhibit 48, fols. 1304-5; Plaintiff's Exhibit 19, fols. 1054b-56b; Plaintiff's Exhibits 4-18, fols. 1045-55; fols. 553-57; 667-94; 150-165).

This fraudulent appropriation of respondent's collateral was made possible through the fact (unknown to the respondent, fol. 494) that the Yorke Warehouse Co. was owned by Coccaro through stock ownership. Its employees were dummies for Coccaro, and, of course, followed his instructions (fols. 116, 174-225).

Two so-called extensions of credit were requested by Coccaro & Co. and granted by respondent with respect to the note of $5,900. This procedure followed the regular methods hereinbefore outlined (Plaintiff's Exhibits 30 and 36; fols. 1102 and 1126).

Prior to the maturity of the last extension of credit, Coccaro & Co. went into bankruptcy on May 27, 1920 (fol. 377).

At the time of the bankruptcy of Coccaro & Co. the firm was indebted to the respondent on six advances of credit, one of these being the credit for

$5,900 furnishing the basis of the controversy in this action (fols. 496, 1136-40).

After the bankruptcy, respondent proceeded to examine its collateral at the Yorke Warehouse, and discovered that this collateral, together with much other collateral, had been removed (fols. 381, 396-7). Investigation established that the petitioners and their assignees had removed the salmon in question.

The case was submitted to the jury entirely on the defense of usury, the respondent's motion to strike out that defense and for a directed verdict being overruled (fols. 954-973). The verdict of the jury was in favor of the petitioners and the judgment entered thereon has been reversed by the United States Circuit Court of Appeals, Second District, which decided that the evidence did not sustain such verdict, that upon the evidence submitted at the trial the trial court should have directed a verdict for the respondent because there was no evidence to sustain a finding that the respondent exacted usury from Coccaro & Co. The Circuit Court of Appeals further decided that the submission of the case to the jury on the theory that it was governed by the laws of New York State was erroneous because the evidence showed that it was subject only to the law of Pennsylvania, under which a contract for the payment of more than 6 per cent. interest is not illegal.

POINT I.

The Circuit Court of Appeals correctly decided that the evidence clearly showed that the respondent did not exact any usurious payment from A. J. Coccaro & Co. and that there was no evidence to sustain the verdict in favor of the petitioners.

In its prima facie case the respondent offered in evidence all the documents in its own possession and in the possession of the note brokers, S. B. Lewis & Co., including the pledge contract (Plaintiff's Exhibit 21, fols. 1059-68); Coccaro & Co.'s order to deliver the note issued thereunder to S. B. Lewis & Co. (Plaintiff's Exhibit 22, fol. 1069); the note issued thereunder endorsed by the purchaser, National Rockland Bank of Boston, Mass. (Plaintiff's Exhibit 24, fols. 1087-89); S. B. Lewis & Co.'s report of its sale, a copy of which was sent at once by mail to Coccaro & Co. (Plaintiff's Exhibit 25, fols. 1090, 1097); S. B. Lewis & Co.'s order on First National Bank of Philadelphia for check for net proceeds of note (Plaintiff's Exhibit 46-B-D, fol. 1058); S. B. Lewis & Co.'s bill to National Rockland Bank of Roxbury, Boston, Mass., the purchaser of the note, for the purchase price thereof (Plaintiff's Exhibit 46-G-C and D, fols. 1085-87); S. B. Lewis & Co.'s memorandum of the sale (Plaintiff's Exhibit 46-A-D, fol. 1225); check of First National Bank of Philadelphia for net proceeds of the note received from S. B. Lewis & Co., and letter accompanying the check sent to the First National Bank of Philadelphia for transfer of the funds to the Irving National Bank, New York City, by telegraph or

telephone, pursuant to Coccaro & Co.'s request (Plaintiff's Exhibits 26 and 27, fols. 1093-5); and similarly the documents on the extensions and other transactions were offered in evidence by the respondent.

It was established without contradiction that the respondent did not receive from S. B. Lewis & Co. or from any of the banks that purchased the various notes, any part of the brokerage or discount charged by them (fols. 285, 305, 348, 395). In each case the total compensation received by the respondent, directly or indirectly, was its commission at the rate of three per cent. per annum.

Upon the prima facie case of the respondent, the court would necessarily have granted a judgment in the respondent's favor, because there was no evidence that would have supported the defense of usury.

Recognizing the fact, the petitioners offered the testimony of one McAndrews as their only witness in support of the defense of usury. It is true that he testified as set forth in the petitioners' petition and brief, but the quotations from his testimony present only small portions of his testimony, and when his entire testimony is read it will be found that by his own words he has destroyed the effect of the words quoted in the petitioners' petition and brief.

His whole testimony must be considered, and not simply disjointed portions of it. The fact that he was called by the petitioners for the purpose of proving their allegation of usury does not in itself show that the whole of his testimony furnished sufficient evidence to sustain a verdict in favor of the petitioners based on that defense.

Ziang Sung Wan v. U. S., 266 U. S., 580.

In an unguarded moment, McAndrew testified (fols. 775-) "I cannot tell you personally that I ever negotiated a loan. I never negotiated a loan." The claim is made by the petitioners that McAndrew was Coccaro's confidential man and that he negotiated the series of advances mentioned in the respondent's bill of particulars. Yet "he never negotiated a loan." And he testified that though he went to Surprenant's office on numerous occasions, he was never introduced to Surprenant by Coccaro and met Surprenant only by doing errands for Coccaro (fol. 767) and according to his testimony Surprenant spoke to him as if he (McAndrew) was an errand boy and not Coccaro's confidential man in charge of the financing of Coccaro's business (fol. 753). McAndrew was never introduced to Cosgrove and did not have any dealing with him and would only be in Coccaro's office when Cosgrove was there when it was necessary for him to interrupt and consult Coccaro on other matters (fol. 477). He went to Philadelphia to get the check for the proceeds of the November 8, 1919 notes, it is true, but that was only an errand, and that was after the negotiations between Coccaro and Cosgrove had been completed.

McAndrew neither signed nor dictated any letters to appellant with reference to the status of the advances of credit (fols. 910-912, 1115, 1119, 1217).

McAndrew's testimony about the alleged conversation with Cosgrove (Cosgrove positively denies having any such conversation with McAndrew, fols. 909-26) is highly improbable.

McAndrew testified that he was trying to get Coccaro out of Surprenant's clutches, but he emphatically stated, "I cannot tell you personally that

I ever negotiated a loan. I never negotiated a loan" (fol. 775).

McAndrew testified that he never thought Surprenant was Coccaro's broker, but in an unguarded talkative mood he testified (fol. 773):

> "I do know that we borrowed direct from Mr. Surprenant. Mr. Surprenant himself was supposed to negotiate the loans for us, and how he brought it about I personally—I personally don't know. I know there was numerous firms that would tender us various documents, that Coccaro would sign, and I personally would take them back to the office of A. U. Surprenant, accompanied with cash or checks."

When McAndrew was asked the names of those firms he dodged and dodged and then changed his story. He would only name the two corporations of which Surprenant was officer as concerns besides the respondent that Coccaro had dealings with through Surprenant.

In *Houghton* v. *Burden*, 228 U. S., 161, where this court considered similar testimony of witnesses eager to make void a transaction for usury so improbable that it reversed a judgment on a verdict based on it, this court very well says:

> "Why should Burden make an agreement to enable him to receive usurious interest, and at the same time make it impossible for him to take such interest without placing him absolutely at the mercy of Canfield?
>
> There is no pretense that Burden was non compos mentis at the time, and yet it is difficult to believe that any rational being would

have gone to the trouble and expense of having this elaborate agreement prepared for the purpose of avoiding the usury law, and at the same time admit to the only man who could interpose the defense of usury that it was a void agreement. So far as the validity of the agreement is concerned, Burden might as well have stamped in red ink on its face the words, 'void for usury.'

We must assume that Burden is a man of ordinary common sense, but in order to find that he made the statement quoted, we must convict him of stupidity which is unique in its originality. It is difficult to imagine that a rational being would procure a safe to protect him from burglary, and immediately send the 'combination' to the burglar whom he had most reason to dread (113 C. C. A., 565, 193 Fed., 937).

Canfield is supported by his bookkeeper, though her account of the matter is materially different from his. Burden is supported by Koehler, the broker, who was in the negotiations throughout, and so far as appears, absolutely disinterested. There are two witnesses against two, and the burden to make out the usury is strongly upon the appellant. Stillman v. Northrup, 109 N. Y., 473, 478, 17 N. E., 379; White v. Benjamin, 138 N. Y., 623, 624, 33 N. E., 1037. In the case last cited it was said:

> 'Usury is a crime; and he who alleges it as a defense to an obligation must establish it by clear and satisfactory evidence.'"

Judge Hough of the Circuit Court of Appeals, Second Circuit in *Re Fishel Nessler & Co.* (192 Fed., 413), says:

"Considering the attitude of most states and countries on this subject, the New York act seems archaic, but that can make no difference in the duty of courts. Since, however, in order to reveal usury, it may be necessary by oral evidence to prove the falsity of paper contracts fair and legal on their face, experience has shown that the statute contains a temptation to rascally borrowers to avoid payment of just debts by offering usury as a defense. On this knowledge of human weakness are founded certain rules of decision—judge made but long since established beyond cavil.

Thus the burden is on him who alleges usury to prove it by clear and satisfactory evidence —the offense is largely one of intent—and the unlawful usance must be given and retained in pursuance of an agreement, mutual and existing at the inception of the transaction (citing cases).

It also happens not infrequently that the lender does more than merely hire out his money, and for such additional service he is entitled to be paid, if the service be actual, and whatever objection there may be to his rate of charge, it cannot be based upon the usury statute, unless the whole transaction is plainly but a cover for unlawful lending (citing cases).

But if, when all the evidence and explanations have been considered, it clearly appears that all the lender did or expected to do was to loan, and all the borrower got or expected to get, was money, then any word or phrase, any collateral or contemporaneous agreement by virtue of which more than the amount of the lawful rate flows into the pockets of the lender,

must and should be swept aside, and the intended and agreed upon usury denounced (citing case)."

We come now to discuss the advertisement referred to in petitioners' brief (pp. 3 and 15). Petitioners seek to make it appear that the respondent inserted this advertisement in a public journal, and that as a result the parties began negotiations which resulted in the transactions in question here. Similarly, the petitioners seek to have it appear that the transactions in question were the first between the parties, and that the methods of the respondent were for the first time discussed between the borrower and the lender. It was necessary for them to do this, so as to make the dummy McAndrew, the important person in the picture. But the facts were quite different. There is no evidence in the case whatsoever, that Coccaro or McAndrew ever saw the advertisement, or that it had any connection with the negotiations which resulted in the first of the transactions between the parties. On the contrary, the evidence showed that the first dealings between respondent and Coccaro were brought about through Coccaro's agent, Surprenant. Further, the transaction in question here with which McAndrew claims so important a part, was not the first transaction between the parties.

So too, the petitioners discuss the advertisement as if it read just, "Time Loans on merchandise," but it does not so read. It reads "Time loans on merchandise in any responsible warehouse at ¼% per month over lowest rate *for best commercial paper*" (italics are ours)—a very different reading from that discussed by the petitioners. We submit that any intelligent business man would understand

its old fashioned abrupt ten-word-telegram in the sense that it was meant, namely, that a merchant having suitable merchandise could by pledging it obtain the best commercial paper payable in the future, upon which he in turn could procure money and that the expense to him would be ¼ of 1 per cent. per month over the expense of meeting the paper when due and the expense of selling it.

The petitioners assert that they see no difference between a delivery of a promissory note and the delivery of a check, while they admit that had the respondent endorsed or guaranteed the payment of the promissory note of Coccaro & Co., the transaction would have been a perfectly valid one.

There is no difference in principle between endorsing a promissory note upon the maker's promise contained in a promissory note itself to pay it when due, and to pay for such endorsement or guarantee (which petitioners concede was legal), and the giving of a promissory note upon a promise contained in a separate paper to deposit with the maker of the note the amount necessary to meet it in full and to pay for the issuance of such promissory note, which was the precedent followed in the instant case.

In the one case the person receiving the accommodation says: "If you will endorse or guarantee my promissory note payable two months from date, so that I may raise funds by selling it, I will pay ¼ of 1% of its face amount." That endorsement or guarantee the petitioners admit is a sale of credit for which the person so selling the credit may charge any amount agreed upon. In the other case, the person receiving the accommodation says: "If you will give me your promissory note payable two months from date, so that I may raise funds by selling it, I will place in your hands at or before the

maturity of your promissory note the sum which you in your promissory note agree to pay and will also pay you ¼ of 1 % of such sum for issuing such promissory note." This latter transaction, the petitioners, for the purpose of their case, assert is a loan of money.

The Circuit Court of Appeals very correctly states:

> "The courts have long recognized the difference between a lending or sale of credit and the lending of money and have repeatedly held that for a lending or sale of credit any price demanded may be paid by the borrower without subjecting the contract to the taint of usury" (citing cases).

The Circuit Court of Appeals correctly found that the transactions between the respondent and Coccaro & Co. were exactly as represented by the respondent, and that there was no evidence adduced by the petitioners to impeach the respondent's proof. Corrupt intent is an essential element of usury. But here there was no evidence of any corrupt intent on the part of the respondent to exact usurious interest from Coccaro & Co. upon the loan of credit, and there was no evidence to show that the actual transaction was other than as shown by the respondent's oral and documentary evidence, a sale of credit. Every note delivered to S. B. Lewis & Co. was actually sold by S. B. Lewis & Co. to a banking institution and actually delivered to the purchaser. (See S. B. Lewis & Co.'s copies of bills to the various purchasers of the note and the endorsements upon those various notes showing the actual possession of those various notes by their respective purchasers.) Plaintiff's Exhibit 46-c,

fols. 1285-1301; 41-D, fols. 1183-1197; 24, fols. 1087-89; 31, fols. 1105-1110.) In no case did the respondent receive more than 3 per cent. per annum in payment for its advances of credit.

The case of Righter & Cowgill Co. v. Philadelphia Warehouse Co., 99 Pa. St., 289, referred to above was in essence almost identical with the case at bar. The court there said:

> "If the testimony tended to prove that the transaction between the parties was merely a cloak for usury, and not a bona fide contract for the storage and sale of goods, to secure the loan in question, it must be conceded the jury should have been permitted to consider and pass upon the question of that presented by the plaintiff's first and second points (the first point being the one quoted above) but we fail to discover, in the provisions of the contract itself, or in the facts and circumstances connected therewith, from its inception to its completion, anything from which the jury would have been justified in finding that it was, in substance and effect, a loan of money at an usurious rate of interest.
>
> There is not a scintilla of evidence that the Thirty dollars was paid for any other purpose than that expressed in the agreement, and in the absence of proof, neither court nor jury had a right to presume it was intended for anything else. * * * The learned Judge was clearly right in saying that no question of usury could arise out of the discount, or the payment of Thirty dollars for services, responsibility," etc.

The petitioners profess to find a difference between the Righter case and the present case and

assert that the Pennsylvania Court decided in favor of the Philadelphia Warehouse Co., in the Righter case only because proof was shown in that case of actual services rendered with reference to the collateral. An examination of that case will show that the pledge contract there in evidence is to all intent and purposes identical with the pledge contract in evidence in the case at bar and that it reads, "receiving $30.00 for their responsibility and services as above and loan of their credit (referring to Philadelphia Warehouse Co.)" The petitioners seek to show that in this case, no services were rendered by the Philadelphia Warehouse Co. The evidence, however, shows that Cosgrove, its Secretary, came on from Philadelphia at Coccaro's request and met Coccaro in New York and that he inspected and appraised the merchandise and in this case received from Coccaro a negotiable bill of lading, which the respondent sent from its Philadelphia office to the Yorke Warehouse, in New York City, and had that warehouse obtain the salmon from the railroad, cart it to the warehouse and issue a non-negotiable warehouse receipt to the respondent and that the respondent secured from A. J. Coccaro & Co. insurance upon the salmon.

In addition to the cases cited by the Circuit Court of Appeals as authorities that any price may be asked for the sale of credit without subjecting the contract to the taint of usury, the following may be considered:

Forgotston v. *McKeon*, 14 App. Div., 342;
Ketchum v. *Barber*, 4 Hill, 224;
Palmer v. *Jones*, 69 Hun, 240;
Elwell v. *Chamberlain*, 31 N. Y., 611;
Orvis v. *Curtiss*, 157 N. Y., 657.

The comment of the petitioners that the decision in Title Guaranty & Surety Company v. Klein cited by Circuit Court of Appeals could not be considered an authority in this case for the reason that while United States bonds fluctuate, the paper of the respondent, a comparatively small business corporation, does not fluctuate, is too fatuous for discussion.

The court below rightly set aside a verdict which was supported by no evidence whatsoever, and which was the plain result of the trial judge permitting a jury to speculate and surmise on inferences and suspicions, and not on facts, and to find a verdict of usury in a case where the plaintiff neither exacted, nor received, directly or indirectly more than at the rate of three per cent. per annum.

POINT II.

The decision of the court below did not overrule the case of Hooley v. Talcott or the case of Andrews v. Pond.

The Hooley case, 129 App. Div., 233, established no new interpretation of the law of the State of New York on the subject of usury. It merely held that in each case the whole facts and circumstances would be looked into in order to ascertain where the contract was made, so as to determine the law of the State to be applied. The decision below in no manner overruled or overlooked the principles, if any, to be found in the Hooley case. An examination of the facts of that case discloses how little bearing the decision could have in the instant case.

The court's attention is called to the fact that the quotations on pages 19 and 20 of the Petitioners' Brief are from the opinion of the New York Appellate Division in the Talcott case (129 App. Div., 236, 240) and not from the charge of the trial judge in the case at bar.

The Circuit Court of Appeals in the case at bar properly held that the contract in question was a unilateral one; and that the offer made by Coccaro in New York ripened into a contract only when the respondent issued its note in Philadelphia, where every act of importance in connection with the transaction was to be bona fidely performed. Accordingly, the court below correctly held that the contract was not only made in Pennsylvania, but was to be performed there as well. This in no manner overrules or conflicts with this court's decision in the case of Andrews v. Pond, 38 U. S., 65.

Ringer v. Virgin Timber Co., 213 Fed., 1001;
Cutler v. Wright, 22 N. Y., 472.

The case of *Kurtz* v. *Doerr*, 180 N. Y., 88, quoted by the petitioners on the subject of the weight to be given evidence in an action where usury is set up as a defense was decided in 1904, while the case of *Houghton* v. *Burden*, 228 U. S., 161, quoted above, was decided by this court in 1913.

POINT III.

The petitioners claim that their rights under Section 1011 of the Revised Statutes have been violated, is without foundation.

This court well says in Baltimore & Ohio Railroad Co. v. Groeger, 266 U. S., 52:

> "The creditability of witnesses, the weight and probative force of evidence are to be determined by the jury, and not by the judge. However, many decisions of this court establish that, in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding."

It is well established that a party who has moved for a directed verdict prior to the submission of the case to the jury and who has taken an exception to the trial court's refusal of that motion, if there was no evidence that justified the jury in bringing in a verdict in favor of the other party, is entitled to have that contrary verdict of the jury set aside, because a refusal of the trial court to direct a verdict under such circumstances is an error of law and not an error of fact.

As shown above, there is no evidence in this case to justify a finding that the respondent exacted usury from Coccaro & Co. The refusal of the trial court to grant the respondent's motion to strike out the affirmative defense of usury and to direct a verdict in favor of the respondent (fols. 954, 973) was an error of law and not of fact and the judgment entered upon the verdict of the jury in favor of the petitioners was properly reversed by the Circuit Court of Appeals, and entirely within its jurisdiction.

Ziang Sung Wan v. *U. S.*, 266 U. S., 580.
Baltimore & Ohio Railroad Co. v. *Groeger*, 266 U. S., 52.
Southern Pacific v. *Pool*, 160 U. S., 438.

POINT IV.

The determination of the Circuit Court of Appeals sought to be reviewed by certiorari involves no doubtful question and no question of general interest or importance.

We submit that we have shown that the Court of Appeals correctly decided this case, that all the evidence in this case shows that the transactions between the respondent and Coccaro & Co., were advances of credit, that the law is now very clear that the usury statutes apply only to loans of money and not to advances of credit, that all the evidence shows that the contract was made in Pennsylvania; that Coccaro & Co., were to discharge their obligations under the pledge contracts at the home office of the respondent in Philadelphia, Pa.; that such place of performance was not chosen for the purpose of avoiding the law of any state, but simply because it was the logical place for A. J. Coccaro & Co., to deposit with the respondent the funds necessary to meet the notes issued by the respondent under the pledge contracts and that the law is clear that the place of performanace of a contract is the place by the law of which its legality is to be tested.

The fact that so many cases involving the same questions here presented have been decided by this court renders a review in this case absolutely purposeless.

The case of Royal Bank of Canada v. Hills Bros. Co., referred to by petitioners, does not involve a question of usury. It is true that this case grows out of a loan by Royal Bank of Canada to Coccaro & Co., and is for the conversion of goods pledged by that partnership with that bank, but as we are

advised by the attorneys for the Royal Bank of Canada, the defendants in that case have not pleaded the defense of usury (under the New York law the defense of usury must be affirmatively pleaded) and with their consent we annex hereto a copy of the answer in that case.

CONCLUSION.

The determination of the Circuit Court of Appeals, sought to be reviewed by certiorari, is in all respects correct, and the petition should be denied.

Respectfully submitted,

LEVENTRITT, RIEGELMAN, CARNS & SCHWARZ,
Attorneys for Respondent,
44 Pine Street,
Manhattan,
New York City.

DAVID LEVENTRITT,
OWEN J. ROBERTS,
CHARLES A. RIEGELMAN,
ARTHUR WATSON,
of Counsel.

Appendix.

SUPREME COURT,

NEW YORK COUNTY.

THE ROYAL BANK OF CANADA,
Plaintiff,

against

THE HILLS BROTHERS COMPANY,
Defendant.

Answer.

Defendant by Breed, Abbott & Morgan, its attorneys, answers the complaint herein as follows:

1. Denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs "Third" and "Fourth" of the complaint, except the allegation that in the months of January, February and March, 1920, defendant removed from the Yorke Warehouse & Storage Company, Inc., 697-701 Greenwich Street in the Borough of Manhattan, City of New York, certain dried apricots.

2. Denies each and every allegation contained in paragraph "Fifth" of the complaint except the allegation that defendant has failed to surrender any apricots to plaintiff.

3. Denies each and every allegation contained in paragraph "Sixth" of the complaint.

WHEREFORE, defendant demands judgment dismissing the complaint herein with costs.

BREED, ABBOTT & MORGAN,
Attorneys for Defendant,
Office and Post Office Address,
32 Liberty Street,
Borough of Manhattan,
City of New York.